UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

T-MOBILE USA, INC.

and **Case 28-CA-148865**

COMMUNICATIONS WORKERS OF AMERICA LOCAL 7011, AFL-CIO

GENERAL COUNSEL'S REPLY BRIEF

TO: Gary W. Shinners, Executive Secretary
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Respectfully submitted,

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Pursuant to Section 102.46(h) of the Board's Rules and Regulations, Counsel for the General Counsel ("General Counsel") files this Reply Brief to Respondent's Answering Brief to General Counsel's Exceptions to the Decision ("ALJD") of Administrative Law Judge Amita Bahman Tracy ("ALJ") in the captioned case.

I. INTRODUCTION

In its Answering Brief, Respondent makes numerous inaccurate assertions about the representations contained in General Counsel's Brief-in-Support of Exceptions (General Counsel's Brief).[1] Contrary to Respondent's assertions, the facts and arguments set forth in the General Counsel's Brief are supported by the record.

II. ARGUMENT

A. Respondent's Contentions Regarding the Discharge of Eddie Aranda are without merit

1. Respondent Knowledge

Respondent raises issue with the General Counsel's argument that knowledge of Aranda's Union activity could be attributed to a particular Third Party Activity (TPA) report

[1] RAB ___ refers to Respondent's Answering Brief to General Counsel's Exceptions followed by the page number. Transcript references are (Tr.__:__) showing the transcript page and line(s), if applicable. ALJD__ refers to JD-(SF)-28-12 issued by the ALJ on June 22, 2012, followed by the page number.

that coincided with his Union "goodie bag" activity. (RAB 26-27) It is undisputed that TPA reports are prepared by Respondent's Human Resources managers and that the activity documented at the Menaul call center entrance was Union activity. (ALJD at 5:35-36) Although the TPA report did not include Aranda's name, knowledge of his activity should be inferred to the person who prepared the report. Significantly, this report was prepared by Human Resources Manager Larissa Johnson (Johnson), a manager who was present at Aranda's desk at a time he had a Union calendar posted on his work station wall, shortly before call information was tracked for him in late January 2015, and was a manager copied to a seminal document associated with his discharge. (GCX 14, 26; RX 24)

Respondent tries to downplay the significance of this and contends the TPA report only contains generic information retrieved from security incident reports. (RAB 25) This "innocuous" argument does not hold water. It is highly unlikely that Johnson or anyone else in management did not discuss the Union activity recorded, particularly based on these reports being prepared during an organizing campaign and Respondent going to the trouble to prepare them. Interestingly, Respondent did not produce the security incident report at hearing. If anything, recording activity that takes place at the entrances where employees venture to engage in Union activities is a reflection of animus. *Partylite Worldwide, Inc.*, 344 NLRB 1342, 1342 fn. 5 (2005) (finding it unlawful for employer to have station managers and supervisors at entrances to the employee parking lot to watch union representatives give literature to employees as they entered and exited the parking lot during shift changes).

2. Respondent Animus

a. *Timing*

Respondent contends that in pursuit of its exceptions the General Counsel has changed the timeline of Aranda's Union activities. This is simply not true. Rather, the General Counsel clarifies this timing. This includes confirming when Aranda began to openly speak about the Union in the pod, when he began wearing Union paraphilia on his person, and when he brought the Union to the Employer as he did when he displayed a Union calendar on his work station wall. (ALJD at 4:34-41; 5:1-28) Throughout this litigation the General Counsel has consistently argued that Aranda's activities grew steadily as he got closer to his termination. Respondent brushes off his activity but no other CSRs in his pod were brazen enough to post Union material *on Respondent property* in the manner he did during the month of his discharge. Notable, shortly after Aranda posted the calendar, his supervisor began a month long process of gathering call information without ever discussing it with him.

Respondent argues that the span of Aranda's Union activities from August 2014 to January 2015 is too attenuated in time from his discharge to warrant a conclusion they served as the basis for his discharge. (RAB 28-29) Respondent leaves out two important points in this assertion. First, Aranda was subject to an intervening adverse action in October 2014 when he was subject to isolation allegedly because of his Union activities. (ALJD at 6-7) Second, Aranda performed generally well throughout his time with Respondent and, as such, Respondent had to build a case to put his job in issue. (ALJD at 6:13-15) Respondent was able to do this with Aranda's call release issues.

b. *Inadequate investigation*

Respondent is not able to overcome the evidence demonstrating that its investigation into Aranda's discharge issue was less than adequate and thus reflective of animus. Respondent, as well as the ALJ, mistakenly rely on Aranda admitting he released calls as being a sufficient basis for not going over each call with him. (RAB 32; ALJD at 23:5-8) This assessment fails on two counts. First, Respondent admitted it did not bring the call recordings to the January 30, 2015 meeting with Aranda. (ALJD at 10: 22-25; Tr. 65, 79, 380) Significantly, it had no knowledge prior to the meeting that Aranda was going to admit releasing some calls and cannot rely on that admission as being a valid reason for not bringing the recordings to the meeting. Not bringing them shows it was only going through the motions in questioning Aranda about his calls and had no intention of conducting a complete investigation. Second, Respondent had call report information in its possession during the meeting but did not review it with Aranda. (Tr. 281, 325, 396-397) Respondent insincerely claims that he did not ask to see it so it did not bother to show him the paperwork. (Tr. 397)

In its Answering Brief, Respondent makes a sweeping claim in all of the comparator examples in the record where a particular call was reviewed the issue was either in dispute or what was said during the call needed discussion. (RAB 32) There is no evidence in the record from the manager or the employees involved that these were the circumstances for the calls being played. Respondent's conclusory statement is nothing more than proffered speculation. Regardless, even though Aranda admitted releasing calls, he did so generally without the same opportunity as his co-workers to explain them.

Respondent claims Aranda's investigation was thorough but record evidence reveals the contrary. (RAB 34) Aranda's first instance of release call conduct was in early

January 2015 when Coach Eliana Lugo (Lugo) observed Aranda having an incomplete call. (ALJD at 8: 5-10) Instead of approaching Aranda about it, she ran a rare trace report on him for the day the call occurred. (ALJD at 8: 6-7, RX 22) Upon receiving the report on January 14, 2015, Lugo did not go over it with Aranda or talk to him about it. (RX 22)

On January 25, 2015, Lugo overhead Aranda abruptly end a call during a side-by-side observation she conducted for his call. (ALJD 8: 28-30) Lugo did not follow up or speak with him about this call. (ALJD at 8: 30-32) Lugo's action is inconsistent with the side-by-sides guidelines that coaches give Customer Service Representatives (CSRs) such as Aranda immediate "in the game" coaching after the call ends. (GCX 17) Instead, upon hearing him release a call on January 25, 2015, she ran a call report for additional days in January. (RX 45) Once she collected what she believed to be sufficient call information, she and Lachioma met with Aranda on January 30, 2015 about the calls.

c. *Disparate Treatment*[2]

Contrary to Respondent's assertions, record evidence shows Aranda was treated differently than other similarly situated employees.[3] CSRs who allegedly released calls were, unlike Aranda, given opportunities to provide Respondent written commitments showing they wished to remain employed and were willing to correct their conduct. (GCX 39-41; RX 32, 33, 35) Respondent is incorrect that it did not provide CSR Janae Javis a commitment opportunity consistent with "decision time" discipline. (RAB 36) Respondent's own witness,

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2 In its Answering Brief, Respondent references to an exhibit (RX 23) that contained call details associated with Aranda's calls. (RAB 11-14) The call details in the report were not compiled until *after* Aranda's discharge and was not relied upon by Respondent when it made its decision to discharge him. (Tr. 472-474) As such, the General Counsel urges the Board to not consider the details in the exhibit.

3 The ALJ and Respondent rely on two employment actions involving employees who used profanity with customers during a call. (ALJD at 14: 5-12; 19-21; RAB 37) The General Counsel argues this conduct is not the same type of call conduct associated with Aranda and his discharge.

Senior Human Resources Manager Mona Otero, attested at hearing Javis was given this opportunity. (Tr. 437) Respondent asserts the General Counsel incorrectly argues that CSR Jayce Kelly received a commitment opportunity. The General Counsel has never made this argument because this CSR was discharged six months *after* Aranda's discharge and three months after his charge was filed.[4] (RX 33, Tr. 440-441)

The General Counsel does not dispute that many of the CSRs employment actions in the record reflect they were discharged by Respondent but these CSRs were only discharged *after* they refused to proffer the requested commitments and/or they refused to acknowledge their conduct. (RX 32, 35, 39-40; Tr. 118, 122, 437, 455) As noted, Aranda was not given the opportunity to prepare a commitment statement. Instead, he was asked to prepare a statement of admission. (GCX 6) Respondent claims commitments associated with "decision time" discipline make no difference in the discipline that results. (RAB 38) This is not correct. CSR Benjamin Black was given the opportunity to provide a commitment to not continue his release call conduct. (GCX 41) He was not discharged but instead given a formal reminder and good standing removal for 90 days. (GCX 41) Regardless, Respondent retains discretion to act on the commitment element of "decision time" discipline.

Disparate treatment is also reflected in how Respondent handled events that led to Aranda's discharge. In Aranda's Coaching Journal, Lugo states she graded one of Aranda's calls as being incomplete and this prompted her running a trace report on him.[5] (RX 2) Lugo acted contrary to company culture when she made the decision to not provide Aranda any

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[4] Respondent claims that Jayce Kelly prepared a statement similar to Aranda's but a review of her statement reflects this is not the case. (RAB 36) Kelly's statement addresses her conduct and wanting to continue employment with Respondent. (RX 34)

[5] Respondent did not produce at hearing the e-mail reflecting the call Lugo claims she graded.

coaching for his call.[6] It is conduct consistent with the "pile on" argument made in General Counsel's Brief.

d. *Refusal to consider medical status*

Aranda provided Respondent sufficient notice he had a medical condition that required accommodation. The General Counsel does not dispute that he already had a medical history with Respondent or that he was not already on FMLA leave for anxiety and depression during the month of his discharge. (Tr. 290; GCX 12) It is how Respondent handled his medical situation when he made it known to them that raise issues of animus with him.

Respondent wrongly claims that Aranda never made it aware that he needed a medical accommodation for an inability to complete customer calls due to medication. (RAB at 42) Respondent attempts to downplay the significance of a December 8, 2014 e-mail Aranda sent Lugo and the in person conversations he had with her about it but the facts are clear that he informed her that he had been off calls and going to the restroom for a situation for which he was under doctor care. (RAB 42; GCX 8, Tr. 404) This e-mail coincides with when Aranda began taking Truvada medication. (Tr. 278-280) Aranda also had a conversation with Lugo about his medical issues a few days after his January 2015 wisdom teeth surgery. (Tr. 294)

Even so, Aranda put Respondent on notice that he had medical issues that were causing him to have release call problems when he told this to Respondent in person and in writing. (GCX 6 Tr. 48-52, 79-81, 275-276, 305, 327-330) Respondent seems to be under the impression that Aranda was restricted as to how he could seek his accommodation. (RAB 43) This impression is not supported by the law. *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d

[6] Respondent argues that Lugo took no further action after she had observed the dropped call. (RAB 40-41) This is not consistent with Respondent's guidelines for side-by side coachings which provide that feedback sessions are to be held with CSRs once their calls are completed. (GCX 17)

1080, 1089 (9th Cir. 2002); *Equal Employment Opportunity Comm'n v. C.R. England, Inc.*, 644 F.3d 1028, 1049 (10th Cir. 2011). Aranda needed only tell Respondent he had a medical condition that was causing him work performance problems. *Americans With Disabilities Act's "Guide for People With Disabilities Seeking Employment*", www.ada.gov/workta.pdf. Aranda did this very thing during the January 30, 2015 meeting, and again in his statement. (GCX 6) Respondent opines that Aranda took advantage of FMLA leave he was granted for his anxiety but he had barely been on that leave for two weeks before Respondent held him responsible for conduct he claimed was resulting from his medical condition. (RAB 43-44)

Respondent admits it took no action to assist Aranda or work with him to modify his existing approved medical accommodation. (Tr. 57-58, 63, 83) Respondent did not even bother to refer him the appropriate Human Resources group Respondent claims handles medical-related accommodations. (RAB 43) Instead, it searched for and accumulated call information for him, including at the time he had wisdom teeth surgery, so that it would have a means to discharge him and end his ever-growing support for the Union and its campaign.

B. Respondent mischaracterizes the evidence and General Counsel's arguments that the separation of Aranda and Figueroa violated Section 8(a)(3) of the Act

In its Answering Brief, Respondent mischaracterizes the isolation allegation in the Complaint and the theory and evidence presented by the General Counsel regarding it. Respondent is incorrect that the General Counsel has failed to establish the necessary elements for an isolation allegation. At the time the seat reassignment was made Figueroa was recruiting Aranda to join the Union's organizing efforts at Respondent's facility. (ALJD at 4: 39-40; 5: 6-7, 6: 23-24; Tr. 255) It is uncontroverted that pod supervisor Lugo overhead some of their conversations. (ALJD at 17: 40-41) When it came time for seat reassignment

in the pod she separated them as far as she could. (ALJD at 19: 12-13; GCX 13; Tr. 25, 28, 201, 263, 298) Contrary to Respondent's assertions, taking such action with an employee shortly after observing him showing interest in the Union warrants an inference of animus and a finding that Respondent's disparate treatment in moving Aranda away from Figueroa in the manner it did was done for pretextual reasons. See *Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 5 (2014) (self-serving, improbable, implausible, and uncorroborated claims each supported the ALJ's findings that false reasons for discharge were evidence of pretext).

In its Answering Brief, Respondent references testimony from Aranda that there may have been another employee moved like him but this is just a red herring attempt to confuse the facts. (RAB 47) The ALJ found, and Respondent's own witnesses attest, that Aranda was the only employee moved in that fashion. (ALJD at 19: 12-13; Tr. 25, 28) Respondent cited no evidence establishing the contrary. Respondent also asserts that the seat reassignment was pre-planned prior to Lugo's contact with Aranda and Figueroa and there was no evidence she was aware they were Union active. (RAB 48) Again, this is another red herring from the Employer. As noted, it is undisputed that Lugo was privy to some of their Union conversations prior to effectuating the seat reassignments.

Respondent also argues that in the Complaint, the General Counsel alleges that Respondent unlawfully isolated Aranda and Figueroa when their seats were changed and that the General Counsel tacitly concedes that Figueroa's seat was not changed in the same manner as Aranda, thus conceding she was not subject to unlawful isolation. (RAB 46) Respondent erroneously references what is alleged in the Complaint. Paragraph 6(a) only alleges that both employees were isolated. It does not restrict the allegation to both

employees having seat changes, only that they were isolated. Record evidence establishes that Aranda and Figueroa were *isolated* when they were separated from sitting with each other in the same corner of the pod.

Respondent wrongly asserts that the effect of the seat reassignment was miniscule because Respondent's actions did not prohibit Aranda and Figueroa from talking in the pod or during their lunch and breaks. (RAB 47-48) What Respondent conveniently undercuts is that Aranda and Figueroa had the benefit of talking about the Union at various times throughout the work day and this benefit was taken away from them when the seat reassignments occurred. Respondent asserts that Aranda and Figueroa only had to physically get up and go to each other to have these conversations in the pod. (RAB 49) Contrary to Respondent's assertions, this only amplifies the effects of the adverse action taken. Instead of having side by side conversations, Aranda and Figueroa were now subject to having their Union conversations more easily exposed to management's observant eye and employees being aware there were consequences to talking about the Union in the pod.

Respondent inaccurately argues in its Answering Brief that the General Counsel has somehow changed with its theory with respect to the alleged isolation because it now argues in Exceptions for the first time unlawful discrimination rather than isolation. (RAB 46) The General Counsel does not deny it has argued this is the isolation allegation involving Aranda being moved to the other side of the pod but it has always been the General Counsel's position the Respondent's actions were motivated by discriminatory reasons. The allegation is pled as an 8(a)(3) allegation and such an allegation prohibits an employer from discriminating against employees because they engage in union activities. Aranda and

Figueroa were separated in their seat reassignment in the manner they were based on interfering with and inhibiting their Union activities in violation of Section 8(a)(3), as alleged.

Dated at Phoenix, Arizona, this 24th day of February 2016.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of GENERAL COUNSEL'S REPLY BRIEF in T-MOBILE USA, INC., in Case 28-CA-148865, was served by E-Gov, E-Filing, and E-Mail on this 24th day of February 2016, on the following:

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